

No. 22208

IN THE
United States Court of Appeals
for the Ninth Circuit

EDOCO TECHNICAL PRODUCTS, INC.,
Plaintiff-Appellant,

VS.

PETER KIEWIT SONS' CO., and
THE B. F. GOODRICH COMPANY,
Defendants-Appellees.

PLAINTIFF-APPELLANT'S OPENING BRIEF

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TOPICAL INDEX

	Page
Jurisdictional Statement	1
Statement Of The Case	
A. History Of The Controversy	2
B. Background Of The Invention	2
C. The Patent In Suit	8
D. The Patent File History	12
E. Defendants' Accused Structure	15
F. The Grounds For Non-Infringement Advanced By Defendants In Their Motion For Summary Judgment	17
Specification Of Errors	18
Summary Of Argument	19
Argument	
1. The District Court's Non-Compliance With Local Rule 4 Was Per Se Grounds For Reversal	20
2. The District Court Erred In Finding A File Wrapper Estoppel Against Claims 1 And 2 Of The Patent In Suit....	21
3. The District Court Erred In Finding Claims 1 And 2 Of The Patent In Suit Not Infringed	24
4. The District Court Erred In Finding There Was No Issue Of Material Fact On The Question Of Non- Infringement	28
Conclusion	37
Appendix	
Worson Patent 3,023,681, March 6, 1962	38
Local Rule - 4(g)	42

TABLE OF AUTHORITIES CITED

Cases

	Page
Cee-Bee Chemical v. Delco, 263 F.2d 150	29
Griffith v. Utah Power, 226 F.2d 66	28
International Manufacturing Co. v. Landon, 336 F.2d 723 (August 1964)	21, 22, 23
Neff Instrument Corp. v. Cohu Electronics, 269 F.2d 668	28
Nelson v. Batson, 322 F.2d 132 (August 1963)	24, 28
Sequoia Union High School District v. United States, 245 F.2d 227	28
Yardley Created Products Co. v. Clopay Corp., 324 F.2d 932	29

Rules

Federal Rules of Civil Procedure, Rule 54(b)	1
Local Rule 4(g) U. S. District Court, Central District of California	42

Statutes

United States Code, Title 28, Sec. 1291	1
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PLAINTIFF-APPELLANT'S OPENING BRIEF

This is an appeal by plaintiff from a Summary Judgment and Decree granted by the United States District Court for the Central District of California holding Claims 1 and 2 of United States Letters Patent No. 3,023,681 as being not infringed by defendants.

JURISDICTIONAL STATEMENT

Jurisdiction to review the judgment and decree of the District Court is conferred by 28 U.S.C. 1291. The judgment is a final judgment within the provisions of Rules 54(b) F.R.C.P. and the Rules of this Court. There is no dispute as to the jurisdiction of the subject matter or of the parties.

STATEMENT OF THE CASE

A. History Of The Controversy

Plaintiff-appellant filed its Complaint September 20, 1966 against defendant Peter Kiewit Sons' Co. alleging infringement of United States Letters Patent No. 3,023,681. On October 20, 1966 Peter Kiewit Sons' Co. filed an Answer and a Counterclaim for a Declaratory Judgment of patent invalidity and non-infringement. Defendant, The B. F. Goodrich Company on October 26, 1966 filed a Motion to Intervene as a defendant. This Motion to Intervene was granted December 22, 1966 and on January 5, 1967 The B. F. Goodrich Company filed its Answer and a Counterclaim for a Declaratory Judgment of patent invalidity and non-infringement.

On March 21, 1967 defendants filed a Motion for Summary Judgment on the grounds that the patent in suit is invalid, that neither defendant has infringed, and that even if the patent is valid and infringed plaintiff is guilty of misuse and therefore cannot enforce said patent. Plaintiff filed appropriate papers opposing the Motion for Summary Judgment and the District Court conducted a hearing on the Motion for Summary Judgment June 5, 1967.

On June 7, 1967 the Court filed a MEMORANDUM OPINION granting defendants' Motion for Summary Judgment upon a consideration of the issue of non-infringement only. A SUMMARY JUDGMENT and a second MEMORANDUM OPINION were both filed June 30, 1967.

B. Background Of The Invention

It is essential to a complete understanding of the

issues in this case that this Court be apprised of the background of the invention.

The invention relates to the field of concrete paving of roadways, airport runways, canals and similar elongated concrete structures. After a length of concrete pavement has been laid, the concrete will upon curing shrink. For many years because of this phenomena it was customary in laying an elongated strip of pavement to form such pavement in successive sections, i.e. a form was laid between which a first length of concrete was poured. After this first section of poured concrete hardened, forms were laid adjacent thereto and the next length of pavement was poured. It was necessary to space the adjoining pavement sections from one another to allow for thermal expansion of the cured concrete and additionally a water seal had to be provided between these adjoining sections.

The practice of forming successive pavement sections of necessity made the pouring of a long strip of pavement slow and costly. To overcome this problem it was proposed to pour a long length of pavement in a single pass and before such length had completely cured, slots were formed across the width thereof by means of power-rotated saws. These slots initially extended downwardly into the upper surface of the poured concrete and when the concrete cured and shrunk the contraction would cause the concrete to crack below and along the slots in a controlled manner. The resulting slots extended through the depth of the concrete and hence it was necessary to fill such slots with a sealing compound in an effort to make the resulting joint watertight.

As an alternative to sawing the slots, it was pro-

posed to insert a strip of metal within the concrete before it cured. When the concrete cured it would crack along the weakened plane formed by the embedded strip. As in the case of the sawed slots, a sealing compound was forced downwardly into the resulting slot in an effort to make it watertight.

The provision of the sawed joint and the joint provided by the embedded strip made it possible to continuously pour an elongated concrete pavement. Unfortunately, however, it was not possible using either of these techniques to provide a permanent watertight seal along the weakened plane joint. This was true because the horizontal movement between adjoining pavement slabs due to thermal expansion and contraction displaced the sealing compound. Displacement of the sealing compound also resulted from the action of rain and ice.

The invention of the patent in suit affords all the advantages of continuous paving with none of the disadvantages inherent to the sawed joint and the heretofore-utilized weakened joint strip former. The invention includes an elongated plastic fracturing band that is embedded in the concrete across the width thereof while the concrete is still soft. The plastic band is of integral construction and of general cruciform cross-section having a vertical band member and a pair of horizontal sealing strips that extend outwardly from the vertical band member. The horizontal sealing strips are formed with longitudinally extending serrations. As the concrete cures and thus contracts, the vertical band member causes the concrete to crack above and below its upper and lower edges.

The concrete as it hardens locks itself to the serrations of the sealing strips so as to form a waterstop between the pavement sections on either side of the plastic band. The simplicity and effectiveness of this invention will become apparent from the schematic drawings appearing immediately herebelow:

FIG. 1

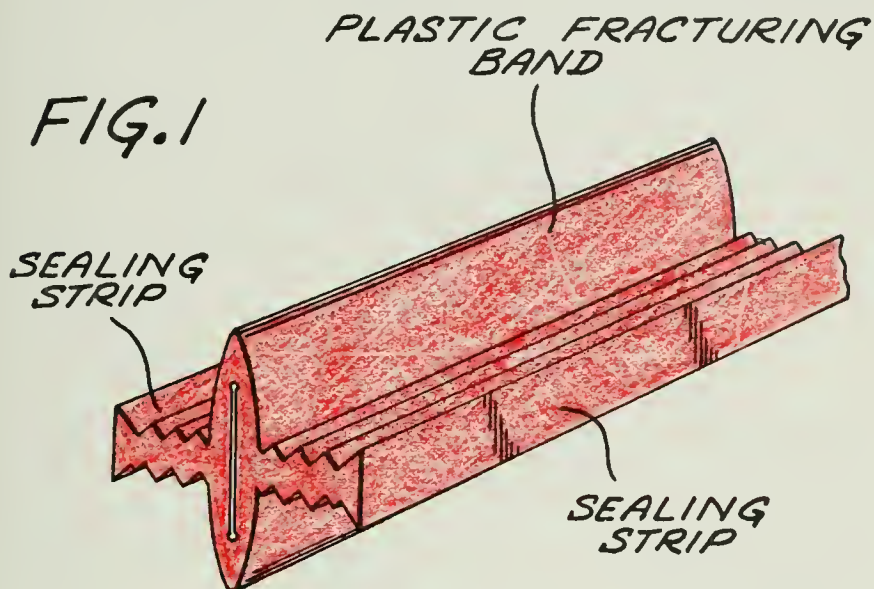


FIG. 2

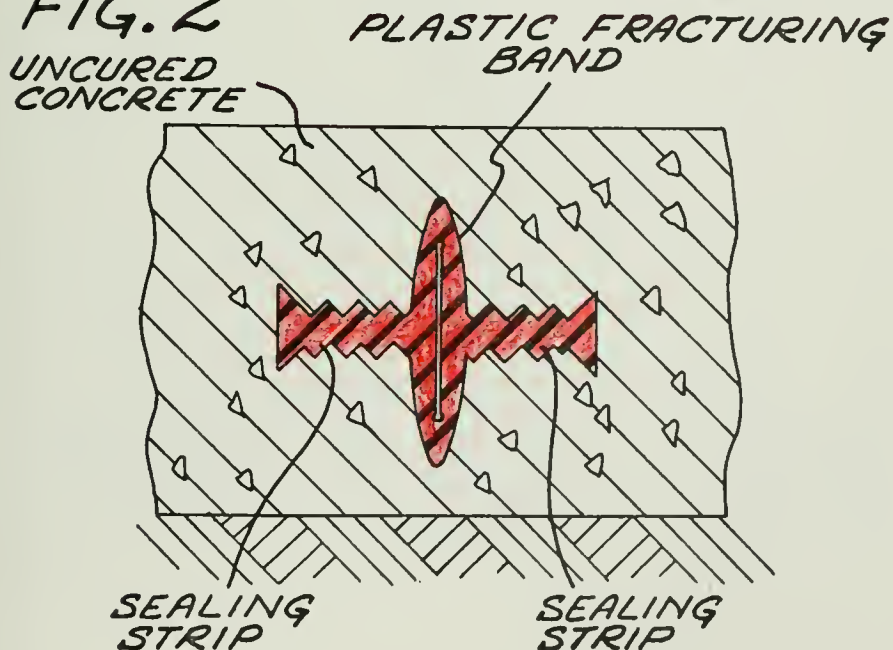


FIG. 3

CURED
CONCRETE

PLASTIC FRACTURING
BAND

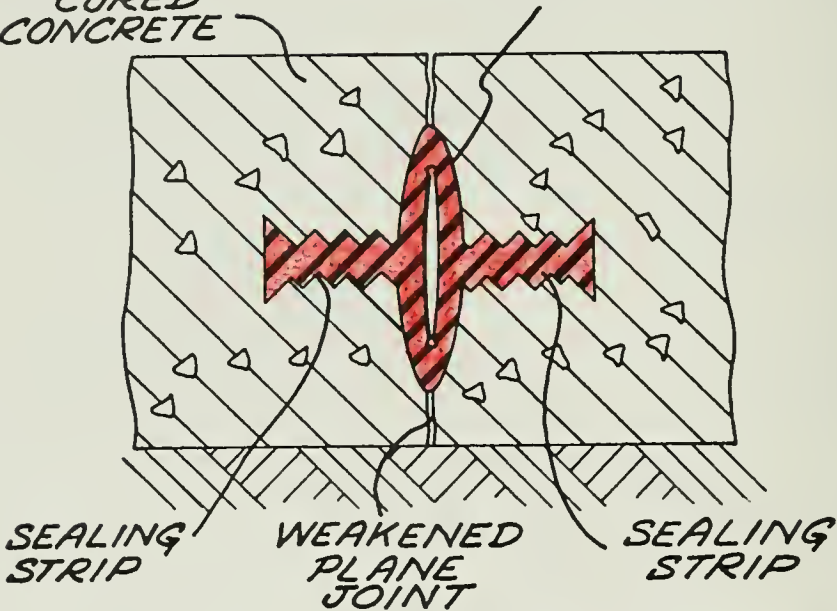
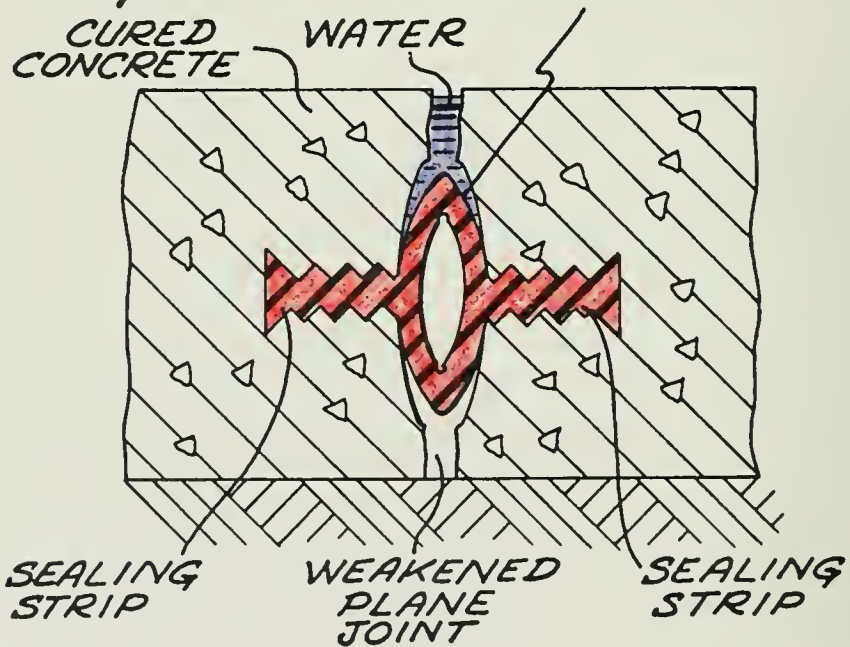


FIG. 4

CURED
CONCRETE

PLASTIC FRACTURING
BAND



Referring to the above drawings, FIG. 1 is a perspective view showing the plastic fracturing band. This band is colored red.

FIG. 2 is a side view showing the plastic band embedded in a body of concrete prior to the time the concrete has cured.

FIG. 3 shows the concrete after it has cured, with the vertical band member defining a weakened plane joint between the opposite pavement sections and the serrations of the sealing strips as being interlocked with the two pavement sections to provide a water-tight joint.

FIG. 4 indicates how the adjoining pavement sections may contract during cold weather and yet the sealing strips continue to act as a waterstop to prevent water (colored blue) from flowing downwardly through the weakened plane joint. It should also be noted that the sealing strips in conjunction with the vertical band member cooperates to lock the adjoining pavement sections against relative vertical movement.

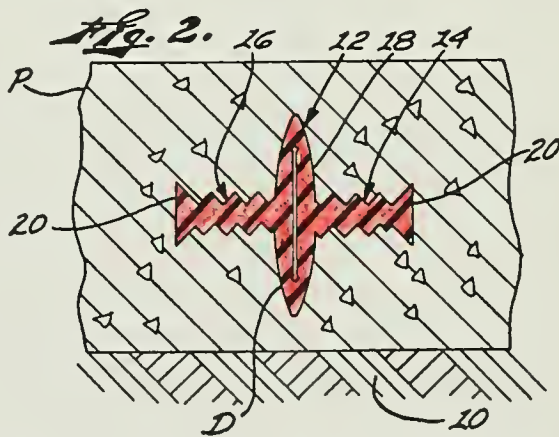
The invention proved to be an important commercial success. For example, as set forth in the Worson Affidavit (Record 251), the invention has been specified by the U. S. Bureau of Reclamation and The California Water Resources Board for use in the huge concrete canal employed on the Feather River Project, the plaintiff herein as of April 1967 having received orders for approximately 11,500,000 feet of the plastic band, while other companies to that time had received orders of approximately 7,500,000 feet. Plaintiff herein between July of 1963 and April 1967 achieved a dol-

lar volume for its plastic band of over \$2,705,000.00. This commercial success was achieved only after plaintiff expended several years and considerable money in convincing the paving trade that the invention does in fact overcome the problems of the prior art.

The commercial success of the invention, of course, has no direct bearing on the issue of infringement. It is believed, however, that this Court should be made aware that the invention is not directed to a mere "paper patent" and instead represents an important contribution to the paving art developed after long years of costly experimentation.

C. The Patent In Suit

A copy of the patent in suit is attached hereto as Appendix A. The patent discloses two forms of plastic fracturing band which may be embodied in the invention. The first form of plastic fracturing band (colored red) is shown herebelow as it appears in FIG. 2 of the patent drawings.



Referring to the above figure, the first form of plastic fracturing band includes a vertically extending

band member 12 and a pair of horizontally extending sealing strips 14 and 16 connected to each side of the band 12 at the intermediate portion thereof. The upper portion of the vertical band 12 tapers upwardly for a distance greater than the thickness of the band to provide a continuous upper straight edge while the lower portion of the vertical band tapers downwardly for a distance greater than the thickness of the band to provide a continuous lower straight edge. The band D is preferably formed of a resilient material, such as a suitable synthetic plastic. It is also preferably hollow having a central air space 18 which permits the band to be spread apart horizontally. The sealing strips 14 and 16 are provided with longitudinal serrations 19 and an anchor element 20 along each end.

Claims 1 and 2 of the patent are at issue and for the convenience of the Court these claims are reproduced herebelow:

1. In a paving section, a weakened plane joint, comprising: an elongated vertically extending paving fracturing band of lesser height than the depth of said paving section, said band having its upper portion tapering upwardly for a distance greater than the thickness of said band to provide a continuous straight edge below the upper surface of said paving section, said band having its lower portion tapering downwardly for a distance greater than the thickness of said band to provide a continuous straight edge disposed above the lower surface of said paving section whereby said paving section undergoes fracturing in vertical alignment with the upper and lower edges of said band as said paving cures so as to define said weakened plane joint across said paving

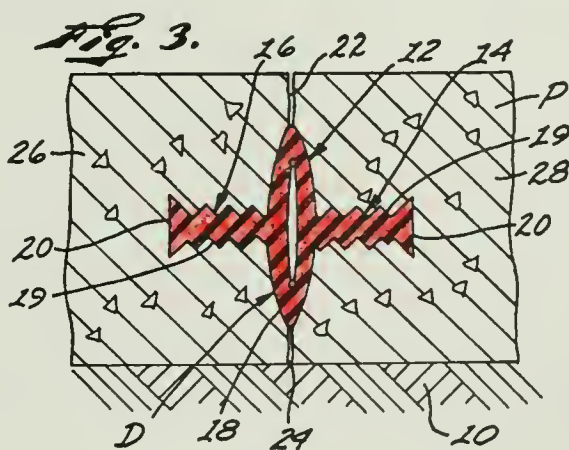
section; and a horizontally extending sealing strip integrally connected to each side of said band, said strips each being formed with longitudinally extending serration means that are firmly embedded within said paving as said paving cures, said sealing strips cooperating with the paving section on either side of said weakened plane joint to restrain the downward flow of water through said joint, said paving fracturing band and said sealing strips being formed of resilient material whereby relative movement is permitted between the portions of said paving section on either side of said weakened plane joint.

2. In a paving section, a weakened plane joint, comprising an elongated vertically extending paving fracturing band of hollow, generally bulbular configuration, having a central air space, said band being of lesser height than the depth of said paving section, said band having its upper portion tapering upwardly for a distance greater than the thickness of said band to provide a continuous straight edge below the upper surface of said paving section, said band having its lower portion tapering downwardly for a distance greater than the thickness of said band to provide a continuous straight edge disposed above the lower surface of said paving section whereby said paving section undergoes fracturing in vertical alignment with the upper and lower edges of said band as said paving cures so as to define said weakened plane joint across said paving section; and a horizontally extending sealing strip integrally connected to each side of said band, said strips each being formed with longitudinally extending serration means that are firmly embedded within said paving as said paving cures, said

sealing strips cooperating with the paving section on either side of said weakened plane joint to restrain the downward flow of water through said joint, said paving fracturing band and said sealing strips being formed of resilient material whereby relative movement is permitted between the portions of said paving section on either side of said weakened plane joint.

Referring to the above claims, it should be particularly noted that such claims are not directed solely to the plastic fracturing band, but instead are directed to a paving section having a weakened plane joint formed by the vertical band member of the plastic band, with the horizontal sealing strips of the plastic band having their longitudinally extending serration means firmly embedded within the paving and such sealing strips cooperating with the paving section on either side of the weakened plane joint formed by the vertical band member to act as a waterstop. Thus, the claims are combination claims.

The combination of the patent claims is depicted in Fig. 3 of the patent which appears herebelow:



D. The Patent File History

In filing their Motion For Summary Judgment the pertinent portion of the file history relied upon by defendants as creating a file wrapper estoppel begins with the filing of Claims 13, 14 and 15 of which Claims 13 and 14 are reproduced herebelow:

“13. In a paving section, a weakened plane joint, comprising: an elongated vertically extending paving fracturing band of lesser height than the depth of said paving section, said band having its upper end disposed below the upper surface of said paving section and its lower end disposed above the lower surface of said paving section; and a horizontally extending sealing strip integrally connected to each side of said band, said strips each being formed with longitudinally extending serration means, said paving section fracturing in vertical alignment with said band as it cures so as to define said weakened plane joint across said paving section whereafter said sealing strips cooperate with said paving section on either side of said weakened plane joint to restrain the downward flow of water through said joint, and said band and strip being formed of a resilient material whereby relative movement is permitted between portions of said paving section on either side of said weakened plane joint.

14. In a paving section, a weakened plane joint, comprising: an elongated vertically extending paving fracturing band of hollow, generally bulbular configuration, having a central air space, said band being of lesser height than the depth of said paving section, said band having its upper end disposed below the upper surface of said

paving section and its lower end disposed above the lower surface of said paving section; and a horizontally extending sealing strip integrally connected to each side of said band, said strips each being formed with longitudinally extending serration means, said paving section fracturing in vertical alignment with said band as it cures so as to define said weakened plane joint across said paving section whereafter said sealing strips cooperate with said paving section on either side of said weakened plane joint to restrain the downward flow of water through said joint, and said band and strip being formed of a resilient material whereby relative movement is permitted between portions of said paving section on either side of said weakened plane joint.”

Claims 13, 14 and 15 were rejected as unpatentable over Heltzel 2,330,214 or Kelley 2,759,403, in view of British Patent No. 646,248. Pursuant to this rejection, the applicant canceled Claims 13, 14 and 15 and substituted therefor new Claims 16, 17 and 18. Claims 16 and 17 became Claims 1 and 2 of the patent.

New claims 16 and 17 were in fact substantially identical to canceled Claims 13 and 14 with additional language added thereto. Such language is set forth herebelow by underlining:

“16. In a paving section, a weakened plane joint, comprising: an elongated vertically extending paving fracturing band of lesser height than the depth of said paving section, *said band having its upper portion tapering upwardly for a distance greater than the thickness of said band to provide a continuous straight edge below the upper surface of said paving section, said band having its lower portion tapering downwardly*

for a distance greater than the thickness of said band to provide a continuous straight edge disposed above the lower surface of said paving section whereby said paving section undergoes fracturing in vertical alignment with the upper and lower edges of said band as said paving cures so as to define said weakened plane joint across said paving section; and a horizontally extending sealing strip integrally connected to each side of said band, said strips each being formed with longitudinally extending serration means that are firmly embedded within said paving as said paving cures, said sealing strips cooperating with the paving section on either side of said weakened plane joint to restrain the downward flow of water through said joint, said paving fracturing band and said sealing strips being formed of resilient material whereby relative movement is permitted between the portions of said paving section on either side of said weakened plane joint.

17. In a paving section, a weakened plane joint, comprising: an elongated vertically extending paving fracturing band of hollow, generally bulbular configuration, having a central air space, said band being of lesser height than the depth of said paving section, *said band having its upper portion tapering upwardly for a distance greater than the thickness of said band to provide a continuous straight edge below the upper surface of said paving section, said band having its lower portion tapering downwardly for a distance greater than the thickness of said band to provide a continuous straight edge disposed above the lower surface of said paving section whereby said paving section undergoes fracturing in vertical alignment with the upper and lower edges of said*

band as said paving cures so as to define said weakened plane joint across said paving section; and a horizontally extending sealing strip integrally connected to each side of said band, said strips each being formed with longitudinally extending serration means that are firmly embedded within said paving as said paving cures, said sealing strips cooperating with the paving section on either side of said weakened plane joint to restrain the downward flow of water through said joint, said paving fracturing band and said sealing strips being formed of resilient material whereby relative movement is permitted between the portions of said paving section on either side of said weakened plane joint."

Referring to the above claims it is critical to note that in addition to the language regarding "tapering" of the upper and lower portions of the vertical band member, there was also added: "for a distance greater than the thickness of said band to provide a continuous straight edge below the upper surface of said paving section" and "for a distance greater than the thickness of said band to provide a continuous straight edge disposed above the lower surface of said paving section," together with the functional wording "whereby said paving section undergoes fracturing in vertical alignment with the upper and lower edges of said band as said paving cures." This wording in its entirety was not present in the claims prior to the April 12, 1961 Amendment.

E. Defendants' Accused Structure

Defendants' accused structure is depicted in drawings presented by defendants and appearing at Page

187 of the Record. Such drawings appear immediately herebelow:

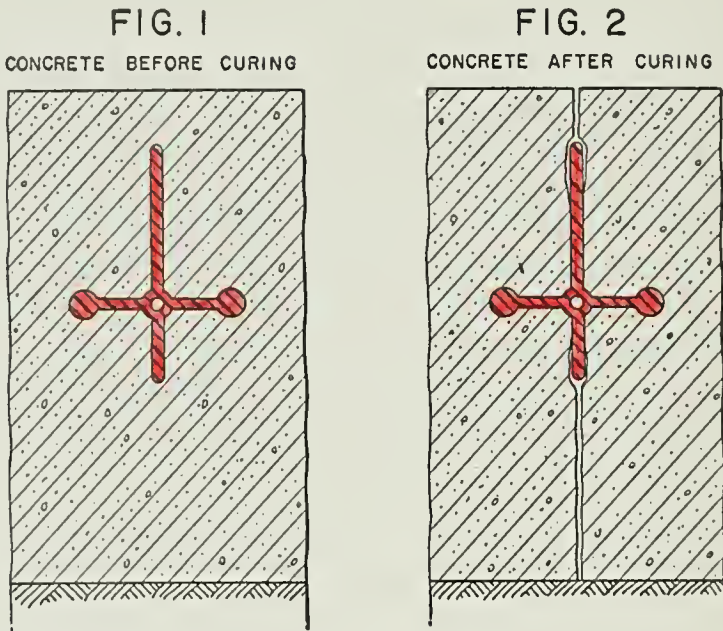


FIG. 1 of the above drawings represents a vertical cross-section of defendants' plastic fracturing band embedded in a block of concrete before the latter has cured. Defendants' plastic band (colored red) is resilient and includes a vertical band member which is generally flat-sided and is rounded at its upper and lower ends. The plastic band also includes a pair of horizontal sealing strips integral with the vertical band member. The outer ends of each sealing strip is provided with a longitudinal bead.

Referring to FIG. 2 above, as the concrete cures the vertical band member cracks a weakened plane joint through the depth of the concrete in exactly the same manner as the vertical band member of applicant's plastic fracturing band. Also, as the concrete

cures, the beads on the outer edges of the sealing strips will become embedded in the concrete whereby these strips define a waterstop at this point.

F. The Grounds For Non-Infringement Advanced By Defendants In Their Motion For Summary Judgment

Defendants' Motion for Summary Judgment, as filed, relied upon the absence of tapers in the vertical band member of defendants' plastic band as avoiding infringement. This avoidance was based upon an alleged file wrapper estoppel which assertedly precluded plaintiff from contending defendants' flat-sided vertical band member was the equivalent of the tapered vertical band member recited in patent Claims 1 and 2. Defendants filed proposed Findings of Fact Nos. 17-27 setting forth their position with respect to this ground of non-infringement (Record 222-227).

It is important to note that *none of defendants' proposed Findings of Fact filed with their Motion for Summary Judgment referred to any lack of equivalency of defendants' sealing strips and the sealing strips recited in Claims 1 and 2 of the patent in suit.*

Plaintiff filed appropriate opposition papers to defendants' Motion for Summary Judgment, including affidavits of the inventor Lee Worson (Record 246) and plaintiff's attorney Francis A. Utecht (Record 243) controverting defendants' proposed Findings of Fact Nos. 17-27 in accordance with Local Rule 4 of the Central District. Local Rule 4 appears at Appendix B.

After the hearing on the Motion for Summary Judgment, the District Court entered its MEMORANDUM

OPINION granting defendants' Motion on the issue of non-infringement only and ordered defendants to prepare appropriate Findings of Fact and Conclusions of Law. Pursuant to this Order, defendants submitted new Findings of Fact including Findings Nos. 23-26 (Record 360-363). Findings 23-26 recited the defendants' vertical band member as being non-infringing since it is straight-sided rather than tapered in view of a file wrapper estoppel precluding plaintiff from having Claims 1 and 2 construed broadly enough to read upon a flat-sided vertical band member. It should be particularly noted, however, that defendants added Findings Nos. 27-33 *which found no counterpart whatever in defendants' original proposed findings*. Findings 27-33 recited that Claims 1 and 2 of the patent in suit were additionally non-infringed because a file wrapper estoppel also precluded plaintiff from construing the longitudinally extending serration means of Claims 1 and 2 as being the equivalent of the enlarged beads along the sides of defendants' horizontal sealing strips.

Plaintiff objected to all of defendants' new Findings of Fact and Conclusions of Law and specifically pointed out the impropriety of permitting new Findings 27-33 to be introduced *after* the hearing on the Motion for Summary Judgment in view of Local Rule 4(g). The District Court, however, ignored all of plaintiff's objections and filed defendants' Findings and Conclusions.

SPECIFICATION OF ERRORS

1. The District Court erred in granting Defendants' Motion For Summary Judgment.

2. The District Court erred in finding Claims 1 and 2 of the patent in suit not infringed.

3. The District Court erred in finding there was no issue of material fact on the question of non-infringement.

4. The District Court erred in finding a file wrapper estoppel against Claims 1 and 2 of the patent in suit.

5. The District Court erred in making Findings 27-33 because such findings had no counterpart in the proposed findings filed with the Motion for Summary Judgment and this practice is directly contrary to Local Rule 4(g) of the Central District of California.

6. The District Court erred in not finding Claims 1 and 2 infringed under the Doctrine of Equivalents.

SUMMARY OF ARGUMENT

The District Court erred in making Findings 27-33 contrary to the mandate of Local Rule 4(g). By making such findings plaintiff was prejudiced since it precluded plaintiff from getting into the record facts necessary to controvert such findings on appeal.

The District Court erred in finding a file wrapper estoppel against the patent claims since the “tapering” limitations added to these claims could by no stretch of the imagination be held directed to the “heart of the invention”.

The District Court erred in not finding the patent claims infringed under the doctrine of equivalents since it was uncontroverted that defendants’ structure performs substantially the same function as the patented

combination in substantially the same way to obtain the same result.

The District Court erred in finding there was no issue of material fact on the question of non-infringement. The Utecht Affidavit raised a genuine issue of material fact as to the reason the “tapering” language was added to the patent claims. The District Court resolved any doubts presented by this affidavit in favor of defendants rather than plaintiff contrary to the well-established law in this circuit that all doubts should be resolved against the party bringing a Motion for Summary Judgment.

ARGUMENT

I. The District Court's Non-Compliance With Local Rule 4 Was Per Se Grounds For Reversal

Referring to Local Rule 4(g) set forth at Appendix B, it is mandatory for the movant in a Motion for Summary Judgment to serve and lodge proposed Findings of Fact stating the material facts as to which the moving party contends there is no genuine issue. The opposing party then has an opportunity to file a statement of genuine issues necessary to be litigated and affidavits controverting the proposed findings of fact presented by the moving party. As pointed out hereinbefore in the statement of the case, prior to the hearing on defendants' Motion for Summary Judgment defendants had not lodged any counterparts for Findings 27-33 submitted after such hearing. Accordingly, plaintiff had no opportunity to file a statement of genuine issues

setting forth which of the new facts of paragraph 27-33 plaintiff contended there existed a genuine issue. Similarly, plaintiff had no opportunity to controvert the facts of paragraph 27-33 by affidavits. *This action of the District Court was prejudicial to plaintiff since it precluded plaintiff from getting into the record facts necessary to controvert such findings on appeal.* Plaintiff was therefore deprived of its day in this Court.

2. The District Court Erred In Finding A File Wrapper Estoppel Against Claims 1 And 2 Of The Patent In Suit.

In this case the District Court found a file wrapper estoppel precluding plaintiff from asserting that defendants' straight-sided vertical band falls within the scope of patent Claims 1 and 2, such claims reciting the vertical band as being tapered. This ground of file wrapper estoppel, however, would not be proper unless the "tapering" language goes to the heart of the invention. This "heart of the invention" doctrine is well-established law in the Ninth Circuit as indicated from the following language in *International Manufacturing Co. v. Landon*, 336 F.2d 723 (August 1964) wherein the Court stated:

"The gravamen of file wrapper estoppel, as this Court recently said in *M.O.S. Corp. v. John I. Haas Co.*, 9 Cir., 332 F.2d 910, 141 USPQ 767, is that an applicant who acquiesces in the rejection of his claim, and accordingly modifies it to secure its allowance, will not subsequently be allowed to expand his claim by interpretation to include the *principles* originally rejected, or their equivalents.

As indicated by the statement made by the

examiner at the time, claim 10 was not rejected because of an overly-broad definition of filter elements, or because it permitted use of a sock-type filter. It was rejected for the reason that claim 10, read as a whole, was unpatentable over other named patents. *The disc-like filter element could not be the heart of the Pace invention since it, as well as the sock-type filter element, is old in the art. What was new, and what was patented, was the combination of parts in which a filter unit is correlated to the remaining elements so that the combination performs the desired skimming and filtering functions.*" (Emphasis Added.)

Because the *International Manufacturing Co.* case is on all fours with the present case, a brief examination of the facts in *International* is believed necessary. In *International* the patented combination was a water recirculation system for use in swimming pools and included a filter, a filter housing, a water passage, a screen, a buoyant weir and a pump. The questioned patent claim originally recited the filter in broad terms. During the patent prosecution the definition of the filter was narrowed to recite such filter as being disc-like. The infringer's device utilized a sock-type filter. It was the infringer's contention that since the patent claim originally recited the filter in broad terms and was later narrowed to recite the filter as being disc-like, a file wrapper estoppel existed against construing the claim broadly enough to read upon the infringer's sock-type filter.

As indicated by the language set forth hereinabove, this Court rejected such contention on the basis that the

disc-like filter could not be the heart of the invention since it was old in the art and that what was new and what was patented was the combination of parts in which a filter unit of any type is correlated to the other elements of the combination so that the combination performs the desired function.

From the above review of the facts in the *International* case it will be seen that the present case is exactly apposite. In the present case, the patent claims did not initially recite the vertical band as being tapered. During the prosecution of the application, however, the tapering of the vertical band was added to the claims. Such tapering, however, could not possibly be considered the heart of the invention and was old in the art, as represented for example by Wey Patent No. 2,901,904, a copy of which appears as Exhibit D to the Book of Patents filed in support of Defendants' Motion for Summary Judgment and Jacobson Patent No. 2,025,209 (Exhibit M of said Book). *What was new and what was patented by Worson was the combination of a length of paving in which the fracturing band was correlated with the paving so that the fracturing band not only formed the weakened plane joint but also served as a waterstop in the completed joint.* Accordingly, the District Court was clearly in error in finding a file wrapper estoppel which precluded plaintiff from construing Claims 1 and 2 broadly enough to read on defendants' straight-sided vertical band.

The District Court also found a file wrapper estoppel precluding plaintiff from construing the "longitudinally extending serration means" of patent Claims 1 and 2

broadly enough to include the enlarged beads formed along the edges of defendants' horizontal sealing strips. As noted hereinbefore, plaintiff had no opportunity to controvert the facts set forth in Findings 27-33 by affidavit. Plaintiff, however, can find no language in the patent file history indicating that the patentee narrowed his description of the means on the sealing strips that interlock with the concrete to form a water seal therebetween because of the prior art. Instead, it would appear that the term finally employed in the claims, i.e. "longitudinal serration means", is broader than the language employed in the specification. Moreover, the serration means per se could hardly be considered the heart of the Worson invention since they are old in the prior art, as represented for example in FIG. 2 of British Patent No. 646,268 (Exhibit L in the Book of Patents) filed with the Motion for Summary Judgment.

3. The District Court Erred In Finding Claims 1 and 2 Of The Patent In Suit Not Infringed.

Admittedly patent Claims 1 and 2 are not literally infringed by defendants' structure. This follows since defendants' vertical band is straight-sided rather than being tapered, and defendant employs elongated beads on the edges of the horizontal sealing strips, rather than the serration means recited in the claims. Plaintiff contends, however, that the doctrine of equivalents applies in this case whereby defendants' structure clearly infringes.

This Court has carefully defined the doctrine of equivalents in *Nelson v. Batson*, 322 F.2d 132 (August 1963):

“To these requirements the doctrine of equivalents is a court-created exception - ‘an anomaly,’ logically inconsistent with the provisions of the statute and the public policy they reflect (*Royal Typewriter Co. v. Remington Rand, Inc.*, 168 F.2d 691, 692, 77 USPQ 517, 518 (2d Cir. 1948), but nonetheless necessary to avoid rendering the patent ‘a hollow and useless thing,’ by permitting the unscrupulous copyist to make unimportant and insubstantial changes and substitutions in the patent which, though adding nothing, would be enough to take the copied matter outside the claim.’ *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.* 339 U.S. 605, 607, 85 USPQ 328, 330 (1950).

“The doctrine of equivalents is directed against those who seek to pirate a patented device with impunity by introducing ‘minor variations to conceal and shelter the piracy.’ 339 U.S. at 607, 85 USPQ at 330. ‘The essence of the doctrine is that one may not practice a fraud on a patent.’ By its terms, a patentee may treat as an infringer one who produces a device which, though not within the literal language of the claims of the patent, ‘performs substantially the same function in substantially the same way to obtain the same result’ as the claimed device, for the two devices are then in reality the same, differing only ‘in name, form or shape.’ 339 U.S. at 608, 85 USPQ at 330.”

Referring particularly to the language appearing in the last paragraph quoted above, defendants’ structure is not within the literal language of the patent claims, however, defendants’ structure performs substantially the same function in substantially the same way to obtain the same result. This equivalency was firmly

established by Paragraphs 12, 13 and 14 of the Worson Affidavit and Paragraph 7 of the Utecht Affidavit. These paragraphs are reproduced herebelow:

Worson Affidavit

“12. I am familiar with the paving sections formed by the defendant Peter Kiewit and shown at Exhibit C of defendants’ MOTION FOR SUMMARY JUDGMENT. This joint employs each of the elements or their equivalents recited in Claims 1 and 2 of my patent. Specifically, such paving section includes a weakened plane joint formed by the upper and lower portion of a resilient band and with such band having horizontally extending sealing strips formed with longitudinally extending projections which are firmly embedded within the paving as the paving cures, such sealing strips cooperating with the paving section on either side of the weakened plane joint to restrain the downward flow of water through the joint. Because the band is of resilient material, relative movement is permitted between the portions of the paving section on either side of the weakened plane joint. The upper and lower portions of the fracturing band provide a continuous straight edge disposed above the lower surface of the paving section and below the upper surface of the paving section whereby the paving section undergoes fracturing and vertical alignment with the upper and lower edges of the band as the paving cures so as to form the weakened plane joint.

13. It is immaterial to the results produced by embedding the band in the paving joint formed by the defendant Kiewit that there is not a uniform taper of the sides of the upper and lower

portions of the fracturing band, since the upper and lower edges of the defendants' fracturing band define straight edges relative to the paving section. Also, it is immaterial that on defendants' band the outer ends of the horizontal strips are formed with generally cylindrical protrusions rather than the serrations employed in my strips, since these protrusions become embedded within the paving as the paving cures whereby the horizontal strips act as waterstops exactly as the horizontal strips in my band act as waterstops.

14. As further proof of the equivalency of the Kiewit paving section and my patented paving section, the U. S. Bureau of Reclamation lists the Goodrich plastic waterstop used in the Kiewit paving section as the equivalent of the CONSTOP waterstop of Edoco Technical Products, Inc. This fact is established by the ADDENDUM NO. 1 issued by the U. S. Bureau of Reclamation, attached hereto as Exhibit D."

Utecht Affidavit

"7. That it is immaterial and inconsequential whether or not such straight edges are defined by having the sides of the upper and lower portions of the band tapering uniformly upwardly and downwardly, or by having the upper and lower portions of the band formed by an abruptly tapered configuration adjacent the center of the band, flat vertically extending surfaces outwardly of said center and rapidly vertically tapering top and bottom edges, as in the case of defendants' strip shown in Exhibit C of the MOTION FOR SUMMARY JUDGMENT."

It will be clearly apparent from the above-quoted language that the defendants' structure "performs sub-

stantially the same function in substantially the same way to obtain the same result” as the structure of patent Claims 1 and 2. Defendants’ structure and the patented structure “are then in reality the same, differing only in name, form or shape”. Thus, according to the doctrine of equivalents as expressed by this Court in *Nelson v. Batson* (Supra), defendants’ structure clearly infringes.

It should be particularly noted that the equivalency of defendants’ structure with the patent claims has never been denied by defendants, in fact, such denial would have raised a question of fact which would have precluded the propriety of the Motion for Summary Judgment. Accordingly, this equivalency must be assumed as true for the purpose of the Motion. Therefore, how can there be any doubt but that the doctrine of equivalents should have been applied in this case so as to preclude the finding that Claims 1 and 2 are not infringed?

4. The District Court Erred In Finding There Was No Issue Of Material Fact On The Question Of Non-Infringement.

It is well established in this Circuit that a Motion for Summary Judgment should not be granted where there exists even a single genuine issue of fact and that all doubts must be resolved against the moving party. This doctrine has been followed in many Ninth Circuit of Appeals decisions including *Sequoia Union High School District v. United States*, 245 F.2d 227, *Neff Instrument Corp. v. Cohu Electronics*, 269 F.2d 668 and *Griffith v. Utah Power*, 226 F.2d 66.

The following language of this Court from *Cee-Bee Chemical v. Delco*, 263 F.2d 150 in reversing a motion for summary judgment in a patent action is particularly in point:

“If the conclusions reached by the trial court required it to first resolve a genuine issue as to a material fact, the case should not have been disposed of on a motion for summary judgment.”

It is plaintiff's position that the issue of infringement in this case requires a determination of fact and therefore could not have properly disposed of by the Motion for Summary Judgment. Traditionally, a Motion For Summary Judgment will not be granted on the basis of non-infringement. A case which is exactly in point is *Yardley Created Products Co. v. Clopay Corp.* decided by the 7th Circuit Court of Appeals in November 1963 and reported at 324 F.2d 932. In the *Yardley* case the Court of Appeals reversed a motion for summary judgment of non-infringement. The motion was granted on the basis that a file wrapper estoppel existed so as to preclude the plaintiff from relying on the doctrine of equivalents. This Court's attention is respectfully directed to the following pertinent language from the *Yardley* decision:

“Plaintiff agrees that, as suggested by Clopay, summary judgment is infrequently granted in patent actions. But plaintiff argues that the simplicity of the devices here involved renders expert opinion testimony of little value; that the Court has before it the prosecution history of the patent and the litigation on which the reissue was based.

“As appellant points out, neither party, nor

the Court, has found a reported Court of Appeals case in which summary judgment has been affirmed when awarded for non-infringement unless there was a clear omission of one or more elements, a substantially different mode of operation, or a clearly shown file wrapper estoppel. Both *Steigleder v. Eberhard Faber Pencil Co.*, 1 Cir., 1949, 176 F.2d 604, 82 USPQ 323, cert. den. 338 U.S. 893, 83 USPQ 544, (cited by plaintiff) and *Vulcan Corp. v. International Shoe Machine Corp.*, District Court, Mass., 1946 68 F.Supp. 990, 60 USPQ 257, afd. Per Curiam, 1 Cir., 1946, 158 F.2d 520, 71 USPQ 310, cert. den. 1947, 330 U.S. 825, 72 USPQ 529, cited in *Steigleder*, fall within that class.

“Yardley does contend, as indicated, that we do have a case of file wrapper estoppel before us. But the issue of file wrapper estoppel presents factual questions.”

Plaintiff herein opposed defendants' Motion for Summary Judgment on the basis that the issue of file wrapper estoppel presented unresolved factual questions. Specifically, PLAINTIFF'S STATEMENT OF GENUINE ISSUES filed in accordance with Local Rule 4(g) included the following:

“12. Whether or not the tapers recited in Claims 1 and 2 constitute the point of novelty of the patented combination.

13. Whether or not the tapers recited in Claims 1 and 2 constitute express and material limitations.

14. Whether or not the tapers added in Claims 1 and 2 gave rise to a file wrapper estoppel.”

In further compliance with Local Rule 4(g) plaintiff

filed the Utech Affidavit controverting defendants' contention that the "tapering" language added to the patent claims constituted the point of novelty of the invention and that such tapers constitute express and material limitations so as to give rise to a file wrapper estoppel. Paragraphs 2-6 of the Utech Affidavit appear herebelow:

Utech Affidavit

"2. That I prepared and prosecuted Worson Patent No. 3,023,681, such patent being the subject of the above-entitled suit.

3. That I have carefully reviewed defendants' MOTION FOR SUMMARY JUDGMENT and accompanying papers filed in the above-entitled action and noted the contention therein that the language added to Claims 1 and 2 of Patent No. 3,023,681 reciting the upper and lower bands as tapering constitutes the point of novelty of the claimed combination (Page 29). Further, that the tapers recited in these claims constitute express and material limitations (Page 31).

4. That, in fact, the tapers recited in said patent claims were immaterial limitations and were introduced into the claims *together with* the words "for a distance greater than the thickness of said band to provide a continuous straight edge below the upper surface of said paving section" and "for a distance greater than the thickness of said band to provide a continuous straight edge disposed above the lower surface of said paving section," together with the functional wording "whereby said paving section undergoes fracturing in vertical alignment with the upper and lower edges of said band as said paving cures."

This wording in its entirety was not present in the claims prior to the amendment dated April 12, 1961. The primary purpose of such wording was to distinguish patentably over Fig. 2 of British Patent No. 646,248, as evidenced by the Remarks accompanying said amendment.

5. That such remarks point out said British Patent No. 646,248 discloses a tubular member 5 disposed at the junction of two separately-joined paving sections 2 and 3. The above-quoted words differentiated from the British patent in that the tubular central portion 5 of the British patent is not intended to nor could it possibly serve as a fracturing band. This is true because its vertical dimensions relative to the depth of the concrete slab are not of sufficient height. The vertical dimension of the tubular part 5 is but slightly greater than the vertical dimensions of the serrated strip 7 relative to the width of the band. Hence, should the British device be embedded in an uncured pavement slab, upon hardening of the pavement the device would not in my opinion effect any vertical fracturing in the manner of the patented device.

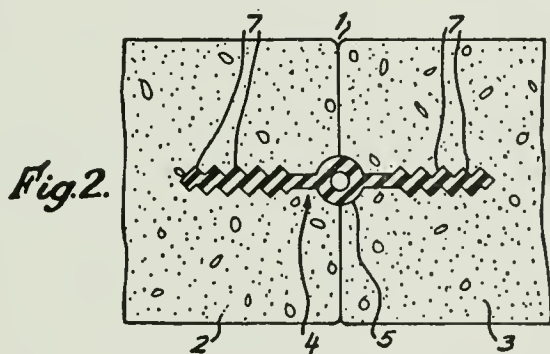
6. That the reference to tapering added to said patent claims was primarily for the purpose of describing the upper and lower edges of applicant's fracturing band as being "straight edges," since it is essential to have a continuous straight edge at the upper and lower ends of the bands in order to effect fracturing.

Referring to the above language, it will be noted that Utecht prepared and prosecuted the patent in suit. Accordingly, *he had first-hand knowledge as to why the "tapering" limitations were introduced*

into the patent claims. According to the Utecht Affidavit the “tapering” language was introduced into the claims together with additional functional language reciting how the vertical band fractured the pavement as the latter cured. The primary purpose of adding such wording to the claims was to distinguish patentably over FIG. 2 of British Patent No. 646,248, as evidenced by the remarks accompanying the amendment which changed the claims.

For the convenience of this Court there appears below FIG. 2 of the British patent and the subject remarks set forth in the amendment which changed the claims:

British Patent No. 646,268



— Remarks —

April 14, 1961 — Amendment

“The courtesy of the Examiner at the recent interview is hereby acknowledged.

At this interview, the desirability of revising the form of the claims so as to patentably distinguish over the prior art was discussed. In accordance with this discussion, claims 13, 14 and 15

have been cancelled and new claims 16, 17 and 18 substituted therefore.

The new claims specifically recite the applicant's paving fracturing band as having an upper portion tapering upwardly for a distance greater than the thickness of the band to provide a continuous straight edge below the upper surface of the paving section. Similarly, the lower portion of the band is recited as tapering downwardly for a distance greater than the thickness of the band to provide a continuous straight edge disposed above the lower surface of the paving section. Because of this configuration, the paving section undergoes fracturing in vertical alignment with the upper and lower edges of the band as the paving cures so as to define a weakened plane joint across the paving section.

This specific description of the applicant's paving fracturing band is believed to clearly distinguish over Fig. 2 of the British patent. In this regard, the British patent discloses a tubular member 5 disposed at the juncture of two separately joined paving sections 2 and 3.

The new claims also recite the applicant's integral horizontally extending sealing strips 14 and 16 as being formed with longitudinally extending serration means that are firmly embedded within the paving as the latter cures. This arrangement insures that the sealing strips will restrain the downward flow of water through the joint while relative movement is permitted by the paving sections on either side of the weakened plane joint."

From the above it will be apparent that the Utech Affidavit presented a genuine issue of fact as to the reason the "tapering" language was added to the patent claims. If the "tapering" language was added solely

to overcome the prior art rejection a file wrapper estoppel would result. If, however, such language was added in conjunction with the other functional language to better distinguish the principle of operation of the entire combination over the British patent (as contended by the affidavit) a file wrapper estoppel would not have arisen. It is important to note that the Remarks accompanying the amendment which changed the claims do not state the “tapering” is essential to the function of the fracturing band. It should further be noted that the first paragraph of such remarks refer to “the desirability of revising the *form* of the claims” as opposed to changing the *substance* of the claims.

If the District Court had given credence to the Utecht Affidavit it could not possibly have found a file wrapper estoppel. Instead the District Court chose to ignore the Utecht Affidavit and resolved the issue of fact presented thereby solely upon the Court’s interpretation of the language of the file history, as evidenced by Finding 34 which appears immediately herebelow:

“34. Insofar as the affidavits of Francis A. Utecht and Lee Worson filed in opposition to defendant’s Motion for Summary Judgment, may appear to conflict with any of the foregoing findings dealing with the file wrapper history, and non-infringement, such affidavits cannot be used to contradict the contents of the file history nor to change the patentee’s position taken therein and therefore present no genuine issues of material facts.”

This action on the part of the District Court raises the question on this appeal as to whether it is proper for

a District Court to completely ignore the sworn affidavit of the patent attorney prosecuting a patent as to the attorney's reasons for amending the claims of such application and substitute for the attorney's reasons the Courts interpretation of such reasons. *This action by the District Court constituted the resolution of a disputed material issue of fact making the granting of the Motion For Summary Judgment improper.*

Of course it might have been proper for the District Court to ignore the Utecht Affidavit if the Worson file history completely contradicted such Affidavit. In the present case however, the remarks quoted hereinabove appearing in the Amendment making the claim changes are in complete accord with the attorney's position. The same is true with respect to the disclosure of the British Patent No. 646,248, such British patent showing a tapered vertical band, but with such band not being of sufficient height relative to the depth of the concrete slab to effect fracturing.

The correlation between the language of the file history and the Utecht Affidavit regarding the reason for adding the tapering language to the claims should have at least raised a doubt as to the propriety of completely discounting the Utecht Affidavit. Since the law is clear that all doubts must be resolved against the moving party, any doubt the District Court had regarding such issue of fact, should have been resolved in plaintiff's favor rather than in favor of the defendants when ruling on defendants' Motion For Summary Judgment.

CONCLUSION

The District Court erred in granting defendants' Motion For Summary Judgment holding the patent in suit invalid.

The District Court's holding should be reversed and the matter remanded to the District Court for trial.

Respectfully submitted,
FULWIDER, PATTON,
RIEBER, LEE & UTECHT

By Francis A. Utecht
Attorneys for Plaintiff-Appellant
Edoco Technical Products, Inc.

CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

Francis A. Utecht

APPENDIX A

March 6, 1962

L. WORSON

3,023,681

COMBINED WEAKENED PLANE JOINT FORMER AND WATERSTOP

Filed April 21, 1958

Fig. 1.

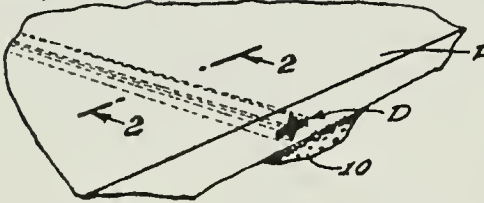


Fig. 2.

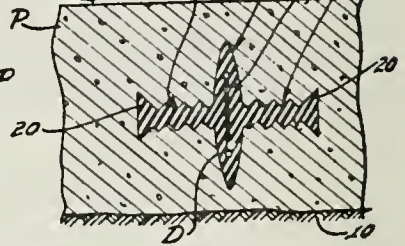


Fig. 3.

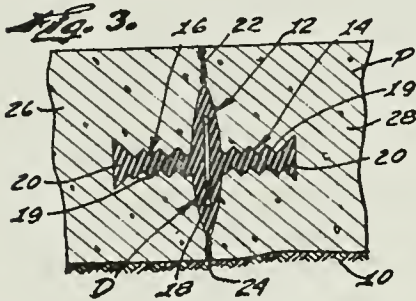


Fig. 4.

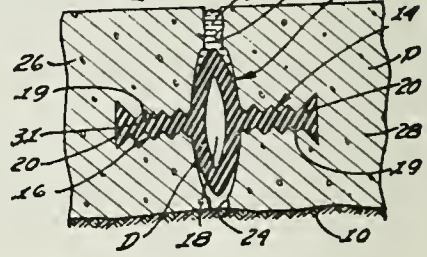


Fig. 5.

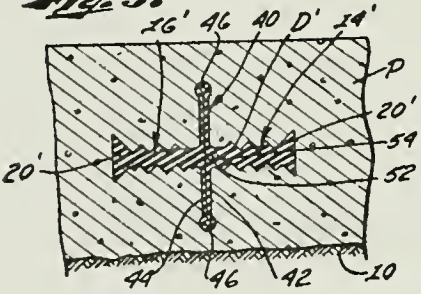


Fig. 6.

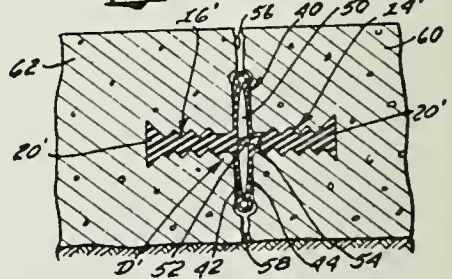


Fig. 7.

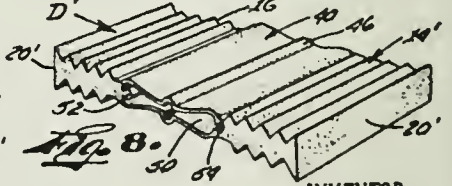
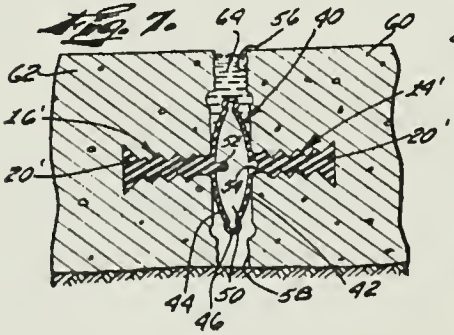


Fig. 8.

INVENTOR
LEE WORSON
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& HUNTLEY
ATTORNEYS

United States Patent Office

3,023,681
Patented Mar. 6, 1962

1

3,023,681 COMBINED WEAKENED PLANE JOINT FORMER AND WATERSTOP

ee Worson, Long Beach, Calif., assignor to Edoco Technical Products, Inc., Long Beach, Calif., a corporation of California

Filed Apr. 21, 1958, Ser. No. 729,743

3 Claims. (Cl. 94—18)

The present invention relates generally to the field of construction and more particularly to the forming and sealing of weakened plane joints in a paved surface.

In the construction of paved roads, airport runways and the like, it is common to transversely extending separator strips at longitudinally spaced points in the uncured paving material. These separator strips serve to define weakened plane joints in the paving material, contraction of the paving material as it cures and hardens causing it to crack at each of the weakened plane joints.

Such weakened plane joints are not provided the pavement would be damaged by the uncontrolled cracking which would otherwise occur during its contraction. In addition to the use of such separator strips for forming weakened plane joints, it has been heretofore proposed to saw vertical slots in the paving material prior to the time it undergoes final contraction. During final contraction, the paving material below the saw cut will fracture so as to form the weakened plane joint.

After a weakened plane joint has been formed, it is necessary by a separate operation to force a sealing compound downwardly thereinto. Such sealing compound restrains the downward flow of water through the weakened plane joint. Unless such downward flow is prevented, water will accumulate beneath the pavement slabs on either side of the joint and as the slabs undergo vertical movement due to the weight of the vehicles passing thereover, the water will gradually wash out the road bed. Additionally, in colder climates the water will freeze with consequent damage to the paving material.

It is a major object of the present invention to provide a combined weakened plane joint former and waterstop device which may be substituted for the heretofore-proposed arrangements of forming and sealing weakened plane joints.

Another object is to provide a device of the aforescribed nature which is more economical in use than the heretofore-proposed weakened plane joint forming and sealing arrangements.

A more particular object is to provide a device of the aforescribed nature which includes an elongated, vertically extending band and a horizontally extending sealing strip connected to each side of the band, which device is adapted to be embedded in an uncured paving section and extending thereacross, the pavement fracturing in vertical alignment with the band as it cures so as to define a weakened plane joint, whereafter the two sealing strips cooperate with the paving material slabs on either side of the joint to restrain the downward flow of water through the joint.

It is yet a further object of the present invention to provide a combined weakened plane joint former and waterstop device of the aforescribed nature which will effectively seal the joint even where the slabs on either side thereof undergo extensive movement in opposite directions.

Another object of the present invention is to provide a combined weakened plane joint former and waterstop device of the aforescribed nature which may be economically packaged for shipping, storing and handling.

An additional object is to provide a novel waterstop device incorporating a unique sealing strip.

These and other objects and advantages of the present

2

invention will become apparent from the following detailed description, when taken in conjunction with the appended drawings wherein:

FIGURE 1 is a perspective view showing a combined weakened plane joint former and waterstop device embodying the present invention embedded in an uncured paving section;

FIGURE 2 is an enlarged vertical sectional view taken on line 2—2 of FIGURE 1;

FIGURE 3 is a second view taken along line 2—2 but showing the manner whereby said device forms a weakened plane joint across said paving section;

FIGURE 4 is a view similar to FIGURE 3 showing how said device functions as a waterstop;

FIGURE 5 is a vertical sectional view showing a second form of combined weakened plane joint former and waterstop device embodying the present invention embedded in an uncured paving section;

FIGURE 6 is a view similar to FIGURE 5 showing the manner said device forms a weakened plane joint across said paving section;

FIGURE 7 is another view similar to FIGURE 5 showing how said device will continue to act as a waterstop even after considerable relative movement of the slabs on either side of the joint in opposite directions; and

FIGURE 8 is an enlarged perspective view showing how said second form of device may be collapsed for shipping, storing and handling.

Referring to the drawings, the first form of combined weakened plane joint former and waterstop device D embodying the present invention is shown embedded in an uncured paving section P. The device D is of elongated configuration and in practice it may be retained in its position of FIGURE 1 by suitable means (not shown) as the paving material is poured around it. The paving section P rests upon a roadbed or other generally horizontal base 10.

Referring now to FIGURE 2, the combined weakened plane joint former and waterstop device D includes an elongated, vertically extending band member, generally designated 12, and a pair of horizontally extending sealing strips, generally designated 14 and 16, that are connected to each side of the band 12. The upper portion of band 12 tapers upwardly for a distance greater than the thickness of the band to provide a continuous upper straight edge while the lower portion of the band tapers downwardly for a distance greater than the thickness of the band to provide a continuous straight edge at the lower end of the band. Preferably, the device D is formed of a resilient material, as for example a suitable synthetic plastic such as polyvinyl chloride. The band 12 is preferably of hollow, generally bulbular configuration having a central air space 18. The strips 14 and 16 are identical and are integral with the band 12. Preferably, these strips 14 and 16 are serrated to define longitudinal ribs 19 and are formed at their free ends with an enlarged anchor element 20. These anchor elements 20 become firmly embedded within the paving material when the latter cures.

Referring now to FIGURE 3, at such time as the paving material of section P cures and thus undergoes contraction, this paving material will fracture in vertical alignment with the band so as to form upper and lower slots indicated at 22 and 24, respectively. In this manner, the device D serves to form a weakened plane joint interposed between two adjoining slabs 26 and 28 created thereby in the paving section P.

Referring now to FIGURE 4, at such times as the slabs 26 and 28 undergo relative movement away from one another, the aforescribed device D will serve as an effective waterstop. In this regard, the water 30 entering the slot 22 above the band 12 will not be able to

3

flow downwardly past the sealing strips 14 and 16 inasmuch as the ribs 19 thereof will cooperate with the ridges 31 formed in the paving material wherein they are embedded to prevent any percolation of such water outwardly along the sealing strips. It should be particularly observed that the greater the relative separation between the slabs 26 and 28, the tighter the seal between the sealing strips 14 and 16 and the paving material wherein they are embedded. This is true because the ribs 19 of these sealing strips will be pulled into tight engagement with the pointed ridges 34 of the paving material. It should also be observed that the provision of the enlarged anchor elements 20 of the sealing strips 14 and 16 reduce the possibility that these strips will become loosened from the paving material P during relative movement between the slabs 26 and 28. As clearly indicated in this figure, the band 12 will under go horizontal expansion normal to its longitudinal axis as the slabs 26 and 28 move away from one another.

Referring now to FIGURES 5 and 8, there is shown a second form of combined weakened plane joint former and water stop device D' embodying the present invention. This second form of device D' is generally similar to the first form D, except for the shape of its band member, generally designated 40. The sealing strips 14' and 16', however, may be identical with their counterparts 14 and 16 of the first form of device D, as will be apparent from the drawings.

The band member 40 of the second form of device D' includes a pair of generally vertically extending, flexible side walls 42 and 44 which are integrally joined along their upper and lower ends by a semi-circular closure bead 41. The side walls 42 and 44 define a central air space 50. The aforementioned sealing strips 14' and 16' are integrally connected to the midportion of the side walls 42 and 44. The midportion of one of the side walls 44 is formed with a male button member 52 that extends towards the opposite side wall 42. This button member 52 is adapted to be received by a complementary female socket 54 centrally formed along the side wall 52 and partially extending into the sealing strip 14'. The button member 52 and the socket 54 cooperate to form readily disengageable fastener means between the side walls 42 and 44.

Referring now to FIGURE 6, at such time as the paving material of section P cures and thus undergoes contraction, this paving material will fracture in vertical alignment with the band 14 so as to form upper and lower slots 56 and 58. In this manner the device D' serves to form a weakened plane joint interposed between two adjoining slabs 60 and 62. During such contraction of the paving material, the button member 52 may become withdrawn from the socket 54.

Referring now to FIGURE 7, at such time as the slabs 60 and 62 undergo relative movement away from one another, the device D' will serve as an effective water-stop to prevent any water 64 entering the upper slot 56 from flowing downwardly past the sealing strips 14' and 16' in the manner described hereinabove with regard to the first form of device D. It should be particularly noted that during any extensive relative movement of the slabs 60 and 62 in opposite directions, the button member 52 will be pulled from the slot 54. The flexibility of the sidewalls 42 and 44 permits even extensive relative movement of the slabs 60 and 62 in opposite directions to take place without damage to the device D'. This is particularly advantageous where the slabs 60 and 62 undergo unplanned movement in opposite directions relative to one another.

Referring now to FIGURE 8, it is a particular feature of the second form of device D' that the band 40 may be collapsed to a substantially horizontally extending configuration at such time as the button member 52 is withdrawn from the socket 54. This permits the device D' to be formed into a roll as shown in this figure

4

so as to facilitate its shipping, storing and handling. When the device D' is to be employed at the job site, the proper length is cut from the roll and thereafter the button member 52 is inserted within the socket 54.

It will be apparent from the foregoing description that a combined weakened plane joint former and waterstop device constructed in accordance with the present invention will afford many advantages over the heretofore proposed arrangements for forming and sealing weakened plane joints. It will also be apparent that various modifications and changes may be made with regard to the foregoing detailed description without departing from the spirit of the invention or the scope of the following claims.

I claim:

1. In a paving section, a weakened plane joint, comprising: an elongated vertically extending paving fracturing band of lesser height than the depth of said paving section, said band having its upper portion tapering upwardly for a distance greater than the thickness of said band to provide a continuous straight edge below the upper surface of said paving section, said band having its lower portion tapering downwardly for a distance greater than the thickness of said band to provide a continuous straight edge disposed above the lower surface of said paving section whereby said paving section undergoes fracturing in vertical alignment with the upper and lower edges of said band as said paving cures so as to define said weakened plane joint across said paving section; and a horizontally extending sealing strip integrally connected to each side of said band, said strips each being formed with longitudinally extending serration means that are firmly embedded within said paving as said paving cures, said sealing strips cooperating with the paving section on either side of said weakened plane joint to restrain the downward flow of water through said joint, said paving fracturing band and said sealing strips being formed of resilient material whereby relative movement is permitted between the portions of said paving section on either side of said weakened plane joint.

2. In a paving section, a weakened plane joint, comprising: an elongated vertically extending paving fracturing band of hollow, generally bulbular configuration, having a central air space, said band being of lesser height than the depth of said paving section, said band having its upper portion tapering upwardly for a distance greater than the thickness of said band to provide a continuous straight edge below the upper surface of said paving section, said band having its lower portion tapering downwardly for a distance greater than the thickness of said band to provide a continuous straight edge disposed above the lower surface of said paving section whereby said paving section undergoes fracturing in vertical alignment with the upper and lower edges of said band as said paving cures so as to define said weakened plane joint across said paving section; and a horizontally extending sealing strip integrally connected to each side of said band, said strips each being formed with longitudinally extending serration means that are firmly embedded within said paving as said paving cures, said sealing strips cooperating with the paving section on either side of said weakened plane joint to restrain the downward flow of water through said joint, said paving fracturing band and said sealing strips being formed of resilient material whereby relative movement is permitted between the portions of said paving section on either side of said weakened plane joint.

3. In a paving section, a weakened plane joint, comprising: an elongated vertically extending paving fracturing band of lesser height than the depth of said paving section, said band having its upper portion tapering upwardly for a distance greater than the thickness of said band to provide a continuous straight edge below the upper surface of said paving section, said band having its lower portion tapering downwardly for a distance greater than the thickness of said band to provide a continuous straight edge disposed

3,023,681

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above the lower surface of said paving section whereby said paving section undergoes fracturing in vertical alignment with the upper and lower edges of said band as said paving cures so as to define said weakened plane joint across said paving section, said fracturing band being defined by a pair of side walls joined along their upper and lower edges so as to define a hollow air space therebetween, with readily disengagable fastener means being interposed between said side walls; and a horizontally extending sealing strip integrally connected to each side of said band, said strips each being formed with longitudinally extending serration means that are firmly embedded within said paving as said paving cures, said sealing strips cooperating with the paving section on either side of said weakened plane joint to restrain the downward flow of water through said joint, said paving fracturing band and said sealing strips being formed of resilient material

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whereby relative movement is permitted between the portions of said paving section on either side of said weakened plane joint.

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APPENDIX B

Local Rule 4(g)

U.S. District Court, Central District of California
“4(g). Motions for Summary Judgment

“(1) There shall be served and lodged with each motion for summary judgment pursuant to Rule 56 of the F.R. Civ. P. proposed findings of fact and conclusions of law and proposed summary judgment. Such proposed findings shall state the material facts as to which the moving party contends there is no genuine issue.

“(2) Any party who opposes the motion shall, not later than five (5) days after service of the notice of motion upon him, serve and file a concise “statement of genuine issues” setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated.

“(3) In determining any motion for summary judgment, the Court may assume that the facts as claimed by the moving party are admitted to exist without controversy except as and to the extent that such facts are controverted by affidavit filed in opposition to the motion.”